No. 156.

Brief of Kirlin for Appellee.

Filed Dec. 14, 1897.

Supreme Court of the United States

OCTOBER TERM, 1897

No. 156

THE AMERICAN SUGAR REFINING COMPANY
Libelant-Appellant

against

THE STEAMSHIP *G. R. BOOTH*
SAVILLE, Claimant-Appellee

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE APPELLEE

J. PARKER KIRLIN
Advocate

Supreme Court of the United States.

OCTOBER TERM, 1897.

THE AMERICAN SUGAR REFINING COMPANY,
Libelant-Appellant,

AGAINST

The Steamship *G. R. Booth;* Saville,
Claimant-Appellee.

No. 156.

This cause comes before the Court on the following certificate from the United States Circuit Court of Appeals for the Second Circuit.

CERTIFICATE.

"A decree in favor of the claimant, dismissing the libel in this cause for damage to cargo, having been made by the District Court of the United States for the Southern District of New York, and an appeal having been taken therefrom to this Court, and the cause having come on for final hearing, certain questions of law arose concerning which this Court desires the instruction of the Supreme Court of the United States for its proper decision. The facts out of which the question arose are as follows,

"On the 14th day of July, 1891, the steamship 'G. R. Booth,' a large seaworthy steel vessel, was lying at the dock in the waters of the harbor of New York, discharging a general cargo, which had been laden on board at Hamburg for transportation to and delivery at New York City. Part of the cargo laden on board at Hamburg consisted of twenty cases of detonators. Detonators are blasting caps, used to explode dynamite or gun-cotton, and consist of a copper cap packed with fulminate of mercury.

In use the cap is placed in contact with dynamite; a fuse is pushed into the cap until it meets the packing; the fuse is lighted, and when the fire reaches the fulminate it explodes it, thus exploding the dynamite. The detonators were made in Germany and were packed according to the regulations prescribed by German law, adopted and enforced for the purpose of eliminating risk of danger in handling and transporting them. When thus packed, the immunity from danger of an accidental explosion is supposed to be complete, and they are transported and handled like ordinary merchandise by carriers and truckmen without the use of any special precautions to avoid risk. They do not explode when subjected to violent shock, as when thrown from such a height above the ground as to shatter in fragments the cases in which they are packed. They were customarily stowed and transported in vessels like ordinary merchandise, indiscriminately with the other cargo, and until the present occurrence, although millions of cases had been shipped and carried to all parts of the world, no accident had happened, so far as is known. The detonators were stowed with other cargo in afterhold No. 4. While the steamship was being unladen one of the cases exploded, making a large hole in the side of the ship, in the No. 4 hold, besides doing other damage.

"In consequence of the opening thus made in the ship's side, sea water rapidly entered in the No. 4 hold, beyond the control of the capacity of the pumps, and passed from the No. 4 hold through the partition into No. 3 hold. In No. 3 hold there was cargo belonging to the libelants, consisting of sugar, which had not as yet been discharged. The sea water thus entering the hold damaged the sugar extensively.

"The boxes of detonators were stowed and handled in the usual way and the explosion occurred purely by accident and without any fault or negligence on the part of any person engaged in transporting them or in discharging the cargo.

"The bill of lading under which the sugar of the libelant was carried contained the following clause:

"'The ship or carrier shall not be liable for loss or damage occasioned by the perils of the sea or other waters; by fire, from any cause, or wheresoever occurring; by barratry of the master or crew; by enemies, pirates, robbers or thieves; by arrest and restraint of princes, rulers or people; by explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery or appurtenances; by collision, stranding, or other accidents of navigation, of whatsoever kind.'

"Upon these facts, the Court desires instructions upon the following questions of law, viz.:

"Whether the damage to libelant's sugar, caused by the sea water which entered the ship through the hole made in her side by the explosion, without her fault, is a 'loss or damage occasioned by perils of the sea or other waters,' or by 'an accident of navigation of whatsoever kind,' within the above mentioned exceptions in the bill of lading."

After the certificate was filed in this Court, an application for a writ of *certiorari* to bring up the whole case for consideration here was denied (164 U. S., 707).

Argument.

The question presented for consideration relates exclusively to the nature of the loss. The Court of Appeals found that the damage occurred purely by accident and without any fault or negligence. The question in effect is whether the loss is excepted by the clause in the bill of lading, or is a non-excepted loss.

Many of the subjects discussed in the appellant's brief are not before the Court under the certificate. Matters concerning the general liability of common carriers, the burden of proof as between shipper and carrier under different forms of exceptions, the policy of the law towards negligence exemptions, the dangers attending the transportation of explosives, &c., have no appropriate place in this discussion. So far as such matters were pertinent in the lower Courts, they were decided against the appellant; they were not certified here; and this Court has refused the writ of *certiorari* prayed for to bring them here (164 U. S., 707). The Court is not even asked to decide whether the exceptions in the bill of lading relieve the ship. The only point here is whether the damage which occurred as described belongs to the class of losses known as losses by "perils of the sea or other waters," or if there be any difference, whether it belongs to the class of losses known as losses by "accidents of navigation."

The material facts on which the question arises are:

(1.) That the explosion did no direct damage to the cargo.

(2.) That the sea water which entered the No. 4 hold through a hole in the ship's side made by the explosion, flowed thence forward through a partition into the No. 3 hold and damaged the cargo there.

(3.) That the explosion and consequent damage to the ship's side which admitted the water, occurred purely by accident and without any fault or negligence.

In this brief the following contentions will be maintained:

(1.) That the proximate cause of the loss was the entrance of sea water through the ship's side, without the ship's fault.

(2.) That damage thus occasioned is a loss by "an accident of navigation," and also by "a peril of the sea or other waters," within the meaning of those words in a policy of insurance on goods.

(3.) That the meaning of the words "a loss by an accident of navigation," or "by a peril of the sea," is the same in a bill of lading as in a policy. The carrier's negligence, or the unseaworthiness of his ship, may exclude the operation of the exception, while negligence conducing to the loss would not be a defense to an underwriter; but this difference does not flow from any different meaning of the same words occurring in two maritime instruments.

(4.) The loss, as such, being within the language of the exceptions, and having occurred without fault, the questions certified should be answered in the affirmative.

POINTS.

I.

The proximate cause of the loss was the entrance of sea water through the ship's side without the ship's fault.

It is certified that "the damage to libelant's sugar" was "*caused* by the sea water which entered the ship through the hole made in her side by the explosion, without her fault." The whole loss was by sea water.

In Judge BROWN'S decision in the District Court (64 Fed. Rep., 878, 879), printed as an appendix to appellant's brief (p. 27), he said:

"The explosion did no direct damage to the sugar, nor in any manner directly affected it. By bursting a hole in the side of the ship, sea water was let into the hold, which subsequently made its way among the sugar and damaged it. Such damage is a sea peril" (The *Xantho*, 12 App. Cas., 503, 508).

The Circuit Court of Appeals certifies that sea water was the *cause* of the damage, and, in effect, inquires of this Court whether it was the *proximate* cause.

The appellant contends that "this inflow of water is not a *cause*," but that the loss is "a damage from explosion."

Both of these propositions, in so far as they may be regarded as statements of fact, are contrary to the explicit language of the certificate, which distinctly states that the damage was "*caused*" by sea water. They are really conclusions of law, and beg the very questions which are certified here for determination

In *Milwaukee* v. *Kellogg*, 94 U. S., 469, 474, it was said:

"The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury. It is not

a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it."

Both the Courts below have found, as a fact, that the proximate cause of the damage was not the explosion, but was the inflow of sea water. The question here is, virtually, was it also the proximate cause in law, so as to bring the loss within the exception?

The appellant approaches the question from the viewpoint of a previous explosion in the hold. Our contention is that the character of the loss, as such, must be regarded first, and that, finding the immediate cause of the damage to be an inflow of sea water, without the ship's fault—a loss peculiar to sea carriage—it is unnecessary to examine or consider the cause of that cause.

This is the principle stated by Mr. Justice CURTIS in *General Mutual Ins. Co.* v. *Sherwood*, 14 How., 351, 366:

"In applying this maxim, in looking for the proximate cause of the loss, if it is found to be a peril of the sea, we inquire no further; we do not look for the cause of that peril."

The maxim has been applied in this sense in *Insurance Company* v. *Transportation Company*, 12 Wall., 194; *Orient Ins. Co.* v. *Adams*, 123 U. S., 67; *Transportation Company* v. *Downer*, 11 Wall., 129; *Railroad Company* v. *Reeves*, 10 Wall., 176; *Morrison* v. *Davis & Co.*, 20 Pa. State, 171; *Scheffer* v. *Railroad Company*, 105 U. S., 249; *Northwestern Transportation Co.* v. *Boston Marine Ins. Co.* (the *Ontario*), 41 Fed. Rep., 793; *City Fire Ins. Co.* v. *Corlies*, 21 Wendell, 367, 369, 371; *Lewis* v. *Springfield Fire and Mar. Ins. Co.*, 10 Gray, 159; *Kenniston* v. *Merrimack Ins. Co.*, 14 N. H., 431; *Babcock* v. *Montgomery Ins. Co.*, 6 Barb., 637; *Grim* v. *Phœnix Ins. Co.*, 13 Johns. Rep., 451.

In *Insurance Company* v. *Transportation Company*, (*supra*), which grew out of the collision, burning and sinking of the steamboat *City of Norwich*, the transportation company carried its own risk of collision, but insured against fire. In consequence of a collision water

entered the ship, and soon reached the floor of the furnace. The steam thereby generated blew out the fire, which communicated with the woodwork of the boat. Her upper works and her combustible freight burned, when she gradually sank in twenty fathoms of water. It was proved that the vessel was so constructed that she would not have sunk below her promenade deck from merely filling, and that her sinking was due to the fire.

It was also proved that the cost of towing her into a safe port, and of repairing the damage due directly to the collision (assuming she would not have sunk below her promenade deck but for the fire) would have been $15,000. Further damage amounting to $7,300 was suffered in consequence of her sinking. The question involved was whether the loss of the $7,300 was a loss by collision or by fire. It was held to be a loss by fire.

Mr. Justice STRONG, in delivering the opinion of the Court (p. 199), said :

"It is true, as argued, that, as the insurance in this case was only against fire, the assured must be regarded as having taken the risk of collision, and it is also true that the collision caused the fire; but it is well settled that when the efficient cause nearest the loss is a peril expressly insured against, the insurer is not to be relieved from responsibility by his showing that the property was brought within that peril by a cause not mentioned in the contract.

"The case quoted (*St. John* v. *The American Mutual Insurance Company*, 1 Kernan, 519) is instructive. The policy, as here, was against fire, but it contained a provision that the company would not be liable 'for any loss occasioned by the explosion of a steam boiler.' While it was in force there was an explosion of a steam boiler which caused the destruction of the property insured by fire. It was held the insurers were not liable. * * * But the Court said, if nothing had been said in the policy respecting a steam boiler, the loss, having been occasioned *by fire*, as its proximate cause, would have rested on the insurers, though it had been shown, as it might have been, that the fire was kindled by means of the explosion. The judgment thus turned on the effect of an express exception. Had there been none, the Court would not have inquired how the fire happened, whether by an explosion or not."

It would seem that if damage by fire, kindled by an explosion, would be within an exception of fire, as above stated, then a damage by sea water, let in by an explosion, would be a loss by a peril of the sea, or by an accident of navigation.

If, instead of letting in water, the explosion had started a fire which had damaged the sugar, the appellant, on the reasoning it adopts, would have been forced to contend that the loss was not within the exception of "fire" in the bill of lading, but was in reality a damage by explosion; yet the cases are clearly against such a construction (*City Fire Ins. Co.* v. *Corlies*, 21 Wend., 367, 369, 371; *Waters* v. *Merchants' Ins. Co*., 11 Peters, 213; per Lord ELLENBOROUGH, in *Gordon* v. *Remington*, 1 Camp., 123).

The same mode of reasoning would also lead to the conclusion that where fire caused the explosion of a powder magazine, resulting in damage by concussion, such damage would really not be damage by explosion, but damage by fire. But here again the cases are opposed (*Everett* v. *London Assurance*, 19 C. B., 126; *Caballero* v. *Home Ins. Co.*, 15 La. An., 217). In both cases the proximate cause is regarded; in the first the loss would be by fire; in the second it would be by explosion.

That this loss is proximately caused by a peril of the sea is proved by the circumstance that if a similar explosion occurred in *land* carriage, no such damage as appellant's cargo suffered could possibly have resulted. The loss was peculiar to sea carriage; it was of the kind certain to happen in consequence of any accident to the ship's side below the water line, and hence distinctively a loss by "an accident of navigation," or, in the ordinary sense, by a peril to which it was subject solely by reason of the fact that the carriage was over sea. It is for this reason that such damage is usually regarded as a loss by dangers of the sea.

Furthermore, if the detonators had been stowed higher up in the ship so that the injury to her side from the explosion would have been above the water line, no damage to cargo would have followed. The damage by explosion would have been the same in degree but would

not have exposed the goods to the peril of injury by the sea. Because the ship was damaged below the water line, an independent, self operating new cause intervened—the peril of the sea—and a damage peculiar to that element resulted.

It is not only losses caused by the violence of the seas that are covered by these exceptions. The words "perils of the sea" or "accidents of navigation" in a bill of lading do not necessarily imply more than the occurrence of a loss peculiar to sea carriage, from one of the dangers incident to transportation of goods by water. If such a loss occurs, in a seaworthy ship, without contributing fault by the carrier, it is within the exception, and the carrier is excused. In *Clark* v. *Barnwell*, 12 How., 272, 282, damage to cargo by sweat in the ship's hold, without the ship's fault, was held to be a loss by "perils of the sea" within an exception in the bill of lading. The same principle is admitted in *The Star of Hope*, 19 Wal., 651, 654; *Transportation Co.* v. *Downer*, 11 Wall., 120, *Hostetter* v. *Park*, 137 U. S., 30; *Hibernia Ins. Co.* v. *St. Louis Transportation Co*, 120 U. S., 166.

It would not be profitable to discuss at length all the cases cited by the appellant on the subject of proximate cause.

Insurance Company v. *Tweed*, 7 Wall., 44, went off on an exception in a fire policy of losses happening by reason of an explosion. Mr. Justice MILLER, who wrote the opinion, himself said of it in a later case that "it went to the verge of sound doctrine in holding the explosion to be the proximate cause of the loss of the Alabama warehouse; but it rested on the ground that no other proximate cause was found" (*Scheffer* v. *Railroad Company*, 105 U. S., at p. 251),

Insurance Company v. *Boone*, 95 U. S., 130, arose under an exception of capture in a fire policy. The decision appears to hold that the burning of the subject matter of the insurance to prevent its capture, at a time when an attack was in progress and about to be successful, was in effect a loss by capture within the exception. This is

analogous to the rule that the loss of goods by blowing up a building to prevent the spread of fire, is damage by fire within a policy, where it appears that they would otherwise have been destroyed by fire (*City Fire Ins. Co.* v. *Corlies*, 21 Wend., 367).

The cases of *Waters* v. *Merchants & Louisville Ins. Company* (11 Peters, 213), and the *Chasca* (L. R., 4 A. & E., 446), merely decided that there is an implied exception in every policy, of losses consequent upon the fraud of the insured. In *Waters* v. *Merchants & Louisville Co*, Mr. Justice STORY said that in policies covering risks by fire generally, "no exception ought to be introduced by construction *except* that of fraud of the assured, which, upon the principles of public policy and morals, was always to be implied" (p. 402). These two cases therefore stand precisely as though the policies had read "not liable for loss by fire or by dangers of the sea, if contributed to by barratry." (See also *Orient Ins. Co.* v. *Adams*, 123 U. S., 67, 73).

The *dicta* in those and other cases are of slight value when considered apart from the special circumstances in view of which they are uttered. "In cases where two causes of loss concur it is often a matter of considerable difficulty to correctly apply the well settled maxim, '*proxima causa non remota spectatur*,' and determine which is to be regarded as the efficient, predominating, and which the remote cause of such loss. While recognizing the rule of looking only to the proximate or predominating cause of the loss, the courts have differed in its application, and the decisions on the subject are in many cases not easily reconciled. The particular facts and circumstances of each case have largely controlled and determined the application of the settled maxim" (*Per* Mr. Justice JACKSON, in the *Ontario*, 41 Fed. Rep., 793, 800).

In the present case, however, as the immediate cause of the loss was the inflow of sea water upon the cargo without the carrier's fault, and is thus *prima facie* a sea-peril loss, it is unnecessary, under the decisions referred to, to work further back in the train of causation. A subtle analysis of all the events which

led up to, and in that sense caused, the damage, would remove the first link in the chain so far that neither the law nor the ordinary business of mankind could permit it to be treated as a cause affecting the legal rights of the parties. In this case, the existence of the detonators on board, their power to damage the ship, their place of stowage, the way they were manufactured or packed, the mode of handling the cases, the law of gravitation which caused the water to descend upon the sugar —each of these may in a sense be represented as the cause of the water entering. But the contract cannot have a different meaning attached to it, as one regards each step in the chain of events as the origin out of which the damage ultimately arose (*Per* Lord HALSBURY in *Hamilton* v. *Pandorf*, 12 A. C., 518, 523).

II.

Damage caused by the entrance of sea water through the ship's side, without the ship's fault, is a loss "by an accident of navigation," and also "by a peril of the sea or other waters," within the meaning of these words in a policy of insurance on goods.

The clause in an ordinary marine policy insuring goods against perils of the sea is as follows:

"And touching the adventures and perils which the company is contented to bear, and does take upon itself, in the voyage so insured as aforesaid, they are of the seas, man-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mark and counter-mark, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes and people of what nation, condition or quality soever, barratry of the master and mariners, *and of all other perils, losses and misfortunes* that have or shall come, to the hurt, detriment, or damage of the [subject matter of insurance] or any part thereof."

Gow, Marine Insurance, p. 349.

If this action had been brought by the owner of the sugar against an insurance company, insuring it under this form of policy, it is not to be doubted that the Court would find the loss was caused by a "peril of the sea" (*Carruthers* v. *Sydebotham*, 4 Maule & Selwyn, 77; *Davidson* v. *Bernaud*, L. R , 4 C. P., 117; *Hibernia Ins. Co.* v. *St. Louis Transportation Co.*, 120 U. S., 166; *Orient Ins. Co.* v. *Adams*, 123 U. S., 67; *Union Ins. Co.* v. *Smith*, 124 U. S., 405; *Cullen* v. *Butler*, 5 M. & S., 461).

In *Carruthers* v. *Sydebotham* (*supra*), goods were damaged on board a vessel in port, which took the ground at low tide, fell over, and was bilged, causing her to fill with water. In an action on the goods policy, *held* that the loss was within an insurance against perils of the sea.

Lord ELLENBOROUGH, *C. J.* (at p. 84), said:

"In this case, the ship has lain on the strand, and the commodity has had sea water on it and has been damaged, which is one of the perils insured against; and all this has happened in the course of the voyage."

BAYLEY, *J.* (at p. 87), said:

"It is unnecessary for me to enter much into detail. With respect to this being a damage occasioned by a sea peril, it is clear that it was the sea water which occasioned it. Therefore, upon that part of the case there can be no doubt."

In *Davidson* v. *Bernaud*, L. R., 4 C. P., 117, a steamer's draft was increased at the port of loading by taking on cargo until the discharge pipe was brought below the surface of the water, which then flowed down the pipe under the valve, and some cocks or valves in the machinery having been negligently left open, flowed into the hold, causing damage to cargo. In an action on a policy covering the goods, it was held, that the loss was within an insurance against "perils of the seas and all other perils, &c."

Hibernia Ins. Co. v. *St. Louis Tranportation Co.* (120 U. S., 166), was a suit in equity by an insurance

company against a transportation company and the transferee of its property, to recover the amount paid by the insurance company as insurer of goods alleged to have been lost in transportation by the negligence of the transportation company. It appeared that the transportation company had contracted to carry a quantity of wheat on the Mississippi River, from St. Louis to New Orleans, by means of certain towboats and barges which it owned, the contract exempting the company from "the dangers of the river." A part of the wheat was laden on a barge which was sent down the river in tow of a tug. The barge broke away from the tow boat, and drifted down the river into collision with a steamboat lying at rest along the bank, breaking and crushing the side of the barge. River water entered through the holes thus made and damaged the wheat. It was alleged that the barge broke loose and drifted down, as stated, through the negligence of the transportation company. The remainder of the wheat was laden on another barge under a bill of lading, excepting "the dangers of navigation." It was alleged that this barge was negligently towed against a visible obstruction in the river known to the master, in consequence of which her side was broken in. Through the hole thus made river water entered and damaged the wheat. There was a demurrer to the bill for want of equity, which was overruled below.

It was assumed in this Court that the losses thus occasioned were within the ordinary terms of the complainant's policy of insurance, and it was held, without passing on any other question, that negligence was not proved, and that *the loss happened by perils excepted in the contract of transportation.*

III.

The meaning of the words "a loss by an accident of navigation," or "by a peril of the sea," is the same in a bill of lading as in a goods policy. The carrier's negligence, or the unseaworthiness of his ship, may exclude the operation of the exception, while negligence conducing to the loss would not be a defense to an underwriter; but this result does not flow from any different meaning of the same words occurring in two maritime instruments.

In the present case the loss would be within the words, whether in a policy or in a bill of lading.

(**1**.) These propositions appear to be expressly adjudged in the case of *Hibernia Insurance Co.* v. *St. Louis Transportation Co.*, 120 U. S., 166, above referred to. They were also decided in The *Xantho*, 12 App. Cas., 503, and in *Hamilton* v. *Pandorf*, 12 App. Cas., 518.

They have been necessarily involved, if not expressly alluded to, in a number of other cases (The *Southgate* (1893), Prob., 329; The *Cressington* (1891), Prob., 152; The *Glendarroch* (1894), Prob., 226; The *Exe*, 14 U. S. App., 626; The *Castleventry*, 69 Fed., 475, *note*).

In the *Xantho* (*supra*) the question at issue was whether the owners of the steamer's cargo could recover from the shipowners their damages sustained by the sinking of the vessel in a collision. The bill of lading contained an exception of "*dangers and accidents of the sea.*"

The course of the case to and in the House of Lords was peculiar. The plaintiffs proved shipment and loss of their cargo by the collision, but adduced no evidence of fault in the *Xantho*. The defendants then proved the exceptions to their liability contained in the bill of lading, and rested. They adduced no evidence to show the *Xantho's* freedom from fault, nor that the other vessel was exclusively in fault; because *Woodly* v. *Michell* (11 Q. B. D., 47) had decided that damage to cargo caused by

a collision due to another vessel's fault was not a loss by a peril of the sea, and that case was binding on the Court of Admiralty. On this state of the proofs, the Admiralty Division held the loss was not "a danger and accident of the sea," and this decision was affirmed in the Court of Appeal.

The question before the House of Lords was virtually two-fold (1), whether *Woodly* v. *Michell* was rightly decided; and (2), if not, whether the Court could say the loss was "a sea peril loss," *without knowing which ship was in fault for the collision.*

The record did not present the further question whether the owners of the Xantho were relieved from liability by the exception, and therefore the House of Lords refrained from expressing any opinion on that point. It dealt exclusively with the nature of the loss, and whether it was within the language of the exception.

The Court overruled *Woodly* v. *Michell*, and held that damage caused by the inflow of sea water through a hole made in the ship's side by collision was "a danger and accident of the sea" within the exception; but left open the question whether the shipowners were entitled or disentitled to the benefit of it.

Lord HERSHELL (at p. 508) said:

"The question, what comes within the term *perils of the sea* (and certainly the words *dangers and accidents of the sea* cannot have a narrower interpretation), has been more frequently the subject of decision in the case of marine policies than of bills of lading. I will first notice the decisions pronounced with regard to the former instrument, and then inquire how far a different interpretation is to be applied in the case of the latter.

"I think it clear that the term *perils of the sea* does not cover every accident or casualty which may happen to the subject matter of the insurance on the sea. It must be a peril 'of' the sea. Again, it is well settled that it is not every loss or damage of which the sea is the immediate cause that is covered by these words. They do not protect, for example, against that natural and inevitable action of the winds and waves, which results in what may be described as wear and tear. There must be some casualty, something which could not be foreseen, as one of the necessary incidents of the adventure. The purpose of the

policy is to secure an indemnity against accidents which may happen, not against events which must happen.

"It was contended that these losses only were losses by perils of the sea, which were occasioned by extraordinary violence of the winds or waves. I think this is too narrow a construction of the words, and it is certainly not supported by the authorities, or by common understanding. It is beyond question that, if a vessel strikes a sunken rock in fair weather and sinks, this is a loss by perils of the sea. And a loss by foundering, owing to a vessel coming into collision with another vessel, even when the collision results from the negligence of that other vessel, falls within the same category. Indeed, I am aware of only one case which throws a doubt upon the proposition that every loss by incursion of the sea, due to a vessel coming accidentally (using that word in its popular sense) into contact with a foreign body, which penetrates it and causes a leak, is a loss by a peril of the sea. I refer to the case of *Cullen* v. *Butler*, 5 *M. & S.*, 461, where a ship having been sunk by another ship firing upon her in mistake for an enemy, the Court inclined to the opinion that this was not a loss by perils of the sea. I think, however, this expression of opinion stands alone, and has not been sanctioned by subsequent cases.

"But it is said that the words, *perils of the sea*, occurring in a bill of lading, or other contract of carriage, must receive a different interpretation from that which is given to them in a policy of marine insurance; that in the latter case the *causa proxima* alone is regarded, whilst, in the former, you may go behind the *causa proxima* and look at what was the real or efficient cause. * * * Now, I quite agree that in the case of a marine policy, the *causa proxima* alone is considered. If that which immediately caused the loss was a peril of the sea, it matters not how it was induced, even if it were by the negligence of those navigating the vessel. It is equally clear that in the case of a bill of lading you may sometimes look behind the immediate cause, and the shipowner is not protected by the exception of perils of the sea in every case in which he would be entitled to recover on his policy, on the ground that there has been a loss by such perils. *But I do not think this difference arises from the words 'perils of the sea' having a different meaning in the two instruments, but from the context or general scope and purpose of the contract of carriage excluding in certain cases the operation of the exception.* It would, in my opinion, be very objectionable, unless well settled authority compelled it, to give a different meaning to the same words occurring in two maritime instruments."

Lord BRAMWELL (at p. 513) said:

"Was it by a peril of the sea that the defendants' ship foundered? *The facts are, that the sea water flowed into her through a hole, and flowed in such quantities that she sank. It seems to me that the bare statement shows she went to the bottom through a peril of the sea.* If the hole had been small, there being a piece of bad wood, a plank starting, or a similar cause, it would be called a leak, and no one would doubt that she foundered from a peril of the sea. Does it make any difference that the hole was large, and occasioned by collision? I cannot think it does.

"It is admitted that if the question had arisen on an insurance against loss by perils of the sea this would have been within the policy a loss by perils of the sea. *Are the words to have different meanings in the two instruments? Why should they? Different consequences may follow. The insurer may be unable to defend himself on the ground that the loss was brought about by the negligence of the crew, while the freighter may maintain an action on the ground that it was. But how is the loss a loss by perils of the sea in one case and not in the other?*

"The argument is, that wind and waves did not cause the loss, but negligence in some one. But surely, if that were so, a loss by striking in calm weather on a sunken rock not marked on the chart would not be a loss by perils of the seas within the bill of lading; or striking on a rock from which the light had been removed, or an iceberg, or a vessel without light. I cannot bring myself to see that such cases are not losses by perils of the sea. Is not the chance of being run against by a clumsy rider one of the perils of hunting? It would be strange if an underwriter on cargo, suing in the name of the cargo owners on the bill of lading, should say, '*I have paid for a loss by perils of the sea, and claim on you because the loss was not by perils of the sea.*'

"The Court of Appeal, with great respect, argued as though the collision caused the loss. So it did in a sense. It was a *causa sine qua non*, but it was not the *causa causans*. It was *causa remota*, but not *causa proxima*. The *causa proxima* of the loss was foundering. It would be strange if a plank started, and the vessel went to the bottom in consequence, that it should be held, 'Oh, the loss is not by perils of the seas, but by bad carpentering.' Let there be no doubt. I do not say that in such case the freighter might not complain that his goods were carried in an unseaworthy ship. All I say is, that the loss would be by perils of the seas."

In *Hamilton* v. *Pandorf* (*supra*), the question was whether damage to rice by sea water, which entered the ship through a hole gnawed in a lead pipe by rats was "a danger or accident of the sea," within an exception in the bill of lading. The Court held it was, and on a finding of the absence of negligence absolved the shipowners from liability.

Lord HALSBURY, *L. C.* (at pp. 522, 523, 524), said:

"My Lords, in this case the admissions made at the trial reduce the question to this: Whether in a seaworthy ship the gnawing by rats of some part of the ship so as to cause sea water to come in and cause damage is a danger and accident of the sea. That this happened without any negligence of the shipowner *is material in determining the rights of the parties in this particular case, but, in my judgment, has no relevancy to the question whether the facts as I have stated them constituted a danger or accident of the sea.* * * *

"Some effect must be given to the words *perils of the sea.* A rat eating a cheese in the hold of a vessel is not a peril of the sea; the sea, or the vessel being on the sea, has nothing to do with the destruction of the cheese. This was the decision of the Court of Exchequer in *Laveroni* v. *Drury*, 8 Ex., 166; 22 L. J. (Ex.), 2. In the Law Journal report of that case Pollock, *C. B.*, and Alderson, *B.*, distinctly pointed out, after the judgment of the Court had been given, that the decision at which the Court had arrived did not touch the question of whether the sea let in by a hole made by a rat was an accident or danger of the sea *One of the dangers which both parties to the contract would have in their mind would, I think, be the possibility of the water from the sea getting into the vessel (from the sea) upon which the vessel was to sail in accomplishing her voyage.* It would not necessarily be by a storm; the parties have not so limited the language of the contract. It might be by striking on a rock, or by excessive heat so as to open some of the upper timbers. These and many more contingencies that might be suggested would let the sea in, but *what the parties, I think, contemplated was that if any accident (not wear and tear, or natural decay) should do damage by letting the sea into the vessel, that that should be one of the things contemplated by the contract.*

"A subtle analysis of all the events which led up to, and in that sense *caused* a thing, may doubtless remove the first link in the chain so far that neither the law nor

the ordinary business of mankind can permit it to be treated as a cause affecting the legal rights of the parties to a suit. In this case the existence of the rats on board, their thirst, the hardness of their teeth, the law of gravitation which caused the water to descend upon the rice, the ship being afloat, the pipe being lead, and its capacity of being gnawed, each of these may be represented as the cause of the water entering, but I do not assent to the view that this contract can have a different meaning attached to it according as you regard each step in the chain of events as the origin out of which the damage ultimately arises.

"In the class of contract *where the shipowner's negligence or misconduct prevents perils of the sea being relied upon, it is not that perils of the sea are different, or that the words ought to have a different meaning attached to them*, but because in those cases an additional term exists in the contract which makes the negligence of the shipowner, or of those for whom he is responsible, a material element; but it is also necessary to give effect to the words *dangers and accidents* of the seas * * *

"One ought, if it is possible, to give effect to all the words that the parties have used to express what this bargain is, and I think in this case *it was a danger, accident or peril, in the contemplation of both parties, that the sea might get in and spoil the rice.* I cannot think it was less such a peril or accident because the hole through which the sea came was made by vermin from within the vessel, and not by a sword fish from without—the sea water did get in."

Lord WATSON (at p. 525) said:

"If the respondents were preferring a claim under a contract of marine insurance, expressed in ordinary terms, I should be clearly of opinion that they were entitled to recover, on the ground that their loss was occasioned by a peril of the sea within the meaning of the contract. When a cargo of rice is directly injured by rats, or by the crew of the vessel, the sea has no share in producing the damage, which in that case is wholly due to a risk not peculiar to the sea, but incidental to the keeping of that class of goods, whether on shore or on board of a voyaging ship. But in the case where rats make a hole, or where one of the crew leaves a porthole open, through which the sea enters and injures the cargo, the sea is the immediate cause of the mischief, and it would afford no answer to the claim of the insured to say that, had ordinary precaution been taken to keep down vermin, or had

careful hands been employed, the sea would not have been admitted and there would have been no consequent damage.

"Your Lordships have now disapproved of the novel doctrine that, in a contract of sea carriage, a meaning must be attached to the expression 'dangers and accidents of the sea' different from that which it bears in a contract insuring cargo against sea risks; that in a case of a charter-party or bill of lading, the Court ought to look to what has been termed the remote, as distinguished from the proximate cause of damage; whereas, in the case of a policy the proximate cause can alone be regarded. *The expression has precisely the same significance in both cases; but there is this difference between them, that when a shipowner, who is bound by the implied terms of the contract, to carry with ordinary care, claims the benefit of the exception, the Court will, if necessary, go behind the proximate cause of damage, for the purpose of ascertaining whether that cause was brought into operation by the negligent act or default of the shipowner, or of those for whom he is responsible.* * * * I am of opinion that the appellants must prevail, *because it has not been shown that the peril, which was the immediate and efficient cause of damage, owed its existence to their negligence.*"

In the *Southgate* (1893), Prob., 329, the entrance of water during the loading of cargo, through an overboard delivery valve, connected with the circulating pump, which the engineer properly opened, but neglected to close, was held to be a loss by "a danger and accident of the seas or other waters," as well as "an accident of navigation," within the meaning of an exception in a bill of lading.

In the *Cressington* (1891), Prob., 152, the exception in the bill of lading was: "Perils of the sea * * * and other accidents of navigation, even when occasioned by the negligence * * * of the * * * master." During the voyage, in consequence of heavy weather, a rivet in the foot of a bulwark stanchion worked loose, and through the leak thereby occasioned the cargo was damaged by sea water. After the weather improved, the master negligently omitted to take sufficient steps to stop the leak, and the cargo was further damaged by sea water. Owing to the dunnage of the waterways in the 'tween-decks being insufficient to allow the water coming from the leak to escape to the bilges, the cargo in the

lower hold was still further damaged. It was *held* that the shipowner was not liable either for the original source of damage to the cargo, or for the damage arising from the continuation of the leakage not being prevented.

Sir JAMES HANNEN, President (at p. 160), said:

"The first question is, whether the *prima facie* liability of the shipowner for the damage which arose to the cargo is removed by the exception contained in the clause. The learned Judge in the Court below appears to have thought that the original source of damage was not attributed to the shipowner, but that he was liable to this extent, that, when the damage was discovered to have arisen, the master did not make use of such means as were in his power to prevent the continuance of the leakage, and that that was not within the exception. We are of opinion that that is not so. *The mischief arose from the inflow of water in the course of navigation, and that, in our judgment, is a peril of the sea and an accident of navigation.* The clause, however, goes on to say, 'perils of the sea and accidents of navigation, even when occasioned by the negligence, default or error in judgment of the pilot, master, mariners, or other servants of the shipowners.' It appears to us from these words in the clause that the alleged negligence on the part of the master was peculiarly such an accident of navigation as it was intended to guard against."

In the *Glendarroch* (1894 Prob.), 226, the plaintiffs brought an action against the owners of the *Glendarroch* for non-delivery of goods shipped under a bill of lading containing the usual exceptions, but not excepting negligence. The goods had been damaged by sea water, through the stranding of the vessel, and the defendants claimed exemption from liability on the ground that the loss was occasioned by perils of the sea.

The President (Sir F. H. JEUNE) ruled that in order to excuse themselves from the damage to the goods, it lay on the defendants to show not only a peril of the sea, but *a peril of the sea not occasioned by their negligence.*

Held by the Court of Appeal (Lord ESHER *M. R.*, LOPES and DAVEY, *L.JJ.*) reversing the decision, that the loss fell within the exception, and that the burden of showing that the defendants were not entitled to the benefit of it, by reason of negligence, lay upon the plaintiffs.

This is precisely the ruling made in *Transportation Co.* v. *Downer* (11 Wall., 129), and in The *Victory* and The *Plymothian*, decided November 29, 1897.

In The *Castleventry*, reported in 69 Fed., 475 (note), the Hanseatic Court of Hamburg held that cargo damage caused by filling the water ballast tanks to overflowing at the port of destination during the discharge of cargo was a loss caused by an accident of navigation. The Court said:

"The second point in dispute between the parties in this suit concerns the question whether, in the case now before the Court, there is any reason to speak of 'an accident of navigation.' This question must be answered in the affirmative. The County Court is right to suppose whilst referring to said verdict of the Imperial Supreme Court (Vol. II., No. 21) that the *accidents of sea and navigation not only include those accidents occurring in the port of shipment, but also those occurring in the port of destination, up to the time of final discharge of cargo. Any accident occurring in handling the tank, especially whilst filling same, has to be treated as an accident due to and caused by navigation, and, therefore, has to be considered to fall under the perils of navigation.*

"This opinion has been expressed by this Court, in a verdict given, 8/2, 1892, * * * which happened in a port of shipment, and had been confirmed by the Supreme Court. It can, therefore, not be seen why the same points of view which are held conclusive for filling a tank in the port of shipment, shall not be held good for the same manipulation, if performed during the discharge of cargo in the port of destination; that means, at the time during which the vessel still served as means of transport, and therefore, the voyage had not been terminated, so far as the cargo is concerned. Consequently, in itself, 'an accident of navigation' must be considered to exist in this case."

The foregoing cases proceed upon sound principles. They hold that the character of the loss, as such, is not altered by the fact that the litigation in respect of it may arise in one case under a policy, and in another under a bill of lading. The words have the same meaning in both cases; but in the latter the exception may not excuse the shipowner if he has broken his substantive contract to

carry the goods with reasonable care. If he has carried with reasonable care, he will be excused wherever the immediate cause of loss is one of the excepted perils, though some antecedent link in the chain of causation may not be within the exception. Perils of the seas or accidents of navigation, therefore, will generally mean, in a seaworthy ship, the damage caused by the fortuitous inflow of the sea. (LOPES, *L. J.*, in *Pandorf* v. *Hamilton*, 5 Asp., 568, 570.) But this exception will only protect the shipowner if he has used reasonable care in carriage, which, in relation to sea damage, will mean providing against every sea casualty which can be reasonably foreseen as one of the necessary incidents of the adventure. In the case of insurance, however, the loss will be payable by the underwriter, notwithstanding want of reasonable care by the carrier, in the absence of an express exception to the contrary; for the reason that the insurer undertakes to indemnify the insured against losses from particular risks without any implied undertaking on the part of the assured that his agents shall use due care to avoid them.

This is a logical rule, easy of comprehension and of application.

The case of *The Xantho* (*supra*) has been cited with approval in this Court in *Liverpool Company* v. *Phenix Ins. Co.*, 129 U. S., at page 438, where the principle it laid down seems to have been substantially adopted, as follows:

"The policy of insurance against perils of the sea covers a loss by negligence of the master or crew, because the insurer assumes to indemnify the insured against losses from *particular perils*, and the insured does not warrant that his servants shall use due care to avoid them; but the ordinary contract of a carrier does involve an obligation on his part to use due care and skill in navigating the vessel and carrying the goods, and, as is everywhere held, an exemption in the bill of lading *of perils of the seas or other specified perils* does not excuse him from that obligation or exempt him from liability *for loss or damage from one of those perils* to which the negligence of himself or his servants has contributed (*The Xantho*, 12 App. Cas., 503)."

This rule of interpretation, as applied to exceptions in bills of lading, was also adopted in The *Star of Hope* (19 Wall., 651, 654).

In the *Ontario*, 37 Fed. Rep., 220, 225, Mr. Justice BROWN, then District Judge, approved the doctrine of both the leading English cases. Referring to a passage in the case of the *Portsmouth* (9 Wall, 682), he said:

"It will be observed here that the Court expressly repudiates a distinction formerly taken between bills of lading and policies of insurance, with regard to what shall be deemed a loss by a peril of the sea. This distinction has also been fully *exploded* by the House of Lords in England in the recent case of *Wilson* v. *Owners of the Xantho*, 6 Asp., 207, 12 App. Cas., 503; and *Hamilton* v. *Pandorf*, 6 Asp., 212, 12 App. Cas., 518, 525."

(2.) There is nothing in the prior decisions to prevent the Court from following these authorities.

The three cases in this court cited by the appellant (Brief, p. 8), as opposed to the principles laid down in the *Xantho*, *Hamilton* v. *Pandorf*, and *Liverpool Company* v. *Phenix Ins. Co.* (*supra*), are the steamboat *New World*, 16 How., 469, *Bulkley* v. *Naumkeag Co.*, 24 How., 386, and the *Mohawk*, 8 Wall., 153.

The case of the *New World* merely decides that under the thirteenth section of the act of July 7, 1838, if a person is injured on board a steamboat by the escape of steam from a boiler it is incumbent on the owners, in an action against them, to prove there was no negligence. It is not perceived that this case is in any way pertinent; but, if pertinent at all in the lower court, where the subject of negligence was open for consideration, it clearly is not so here, where the certificate states that the damage resulted from pure accident, without any contributory fault or negligence whatever.

In *Bulkley* v. *Naumkeag Co.* (*supra*), cotton had been engaged for shipment by the barque *Edwin* from Mobile to Boston. The condition of the bay at Mobile was such that the barque could not pass the bar in the bay, which was a considerable distance below the city. The mode of loading

was for the captain to employ and pay a steam lighter to carry the cotton from the wharf to the ship. The lighterman gave his own receipt for the cotton at the wharf, and, on delivering the cargo to the vessel below the bar, took a receipt from the officer in charge. The course of business was for bills of lading, based on the lighterage receipts, to be signed subsequently.

During one of the trips of the steam lighter her boiler burst and a hundred bales of cotton were thrown into the water.

No bill of lading had as yet been signed for them.

The Court held that by the understanding of both parties the cotton was in the custody of the *Edwin* from the time of its delivery into the custody of the lighterman at the dock; that "the delivery of the hundred bales to the lighterman was a delivery to the master, and the transportation by the lighter to the vessel at the commencement of the voyage was, in execution of the contract, the same, in judgment of law, as if the hundred bales had been placed on board of the vessel at the city instead of on the lighter. The lighter was simply a substitute for the barque for this portion of the service" (p. 391).

The ground of the decision seems to be that as the lighter was a means substituted by the ship for transporting the cotton from the dock to the bar, she assumed all additional risks of injury to the goods by the lighter during that part of the transit. The risk of the goods being thrown into the water by an explosion while on the lighter, was not a risk to which they would have been subject if taken on board the barque at the dock. The Court declined to consider the effect of a bill of lading signed for this cotton, under protest, after the disaster.

In the propeller *Mohawk*, (*supra*), a vessel with a cargo of wheat grounded on the St. Clair Flats, near Detroit. In the effort to get her off she became disabled by the bursting of her boiler, and afterwards sank, and was compelled to suspend her voyage for a few days to make necessary repairs. A large quantity of wheat was damaged by the sinking of the propeller. The contract of carriage excepted "dangers of navigation." The owners of the

wheat immediately abandoned it to the underwriters as for a total loss. The latter, having accepted the abandonment and paid the loss to the owners, ordered their agent at Detroit to take possession of the damaged wheat and sell it as it lay in the vessel, and the agent did so. A delivery into lighters to the purchaser began on the same day. On the next day the agent was instructed to have nothing to do with the grain unless the owners of the vessel would relinquish all claim for freight. It was arranged, however, between the agent and the master that as the sale was a good one, it should stand, and the freight should be left for after consideration.

The vessel subsequently repaired and carried forward to Buffalo eleven hundred bushels of undamaged wheat. On that residue the insurance company tendered full freight and a sum to cover general average charges, but refused to pay *pro rata* freight on the wheat delivered at the Flats. The master accordingly refused to deliver the eleven hundred bushels, its value being less than the freight on it and the *pro rata* freight on the larger quantity sold. Libels were filed in the District Court of Illinois in the name of the owners of the wheat, claiming damages for the non-delivery. After hearing, the libels were dismissed.

On appeal to the Circuit Court, an assignee of the insurance company, which had paid the losses, intervened. His intervention was consolidated with the other libels. The Circuit Court affirmed the decree of the District Court.

The assignee then appealed to the Supreme Court, claiming:

(1) To have damages for the injury to the cargo by the sinking of the propeller;

(2) To have the eleven hundred bushels which the propeller had retained, or their value, upon paying the freight earned upon that parcel only.

The decree of the Circuit Court was affirmed, this Court finding, on the facts, that the voluntary acceptance of the

cargo, at the time of the disaster, by the insurance company was in discharge of any further responsibility of the vessel (p. 160). It seems to have been assumed (p. 161) that the disaster happened in consequence of one of the perils within the exception in the bill of lading. But the Court held that the effect would be the same, whether it happened in consequence of an excepted peril or not (p. 161), and adjudged that the captain recover freight on the undamaged wheat delivered in Buffalo and *pro rata* freight on that delivered at the Flats.

The remark of Mr. Justice NELSON (p. 162) that "the explosion of the boiler was not a peril within the exception in the bill of lading," was purely *obiter*, and it is not entirely clear from the context whether he meant to say it was not within the exception so as to excuse the ship from her obligation to complete the voyage, or that the damage was not within it. The contention in argument was that the boiler exploded in the effort to get the ship off, either from defects in it, or from negligence in the engineer (p. 158). If the learned Justice felt that either of those points was established, the logical consequence would have been to hold that the defect or negligence deprived the owner of the benefit of the exception, rather than to say that such defect or negligence changed the character of the loss (The *Star of Hope*, 19 Wall., 651, 654). The remark was merely a *dictum* in any event, as the ship was adjudged not liable for the damage and entitled to her *pro rata* freight.

The remaining cases cited by the appellant (Brief, Point II., p. 8) do not support the proposition for which they are cited. They are really cases on the burden of proof, dealing with the question as to what, if any, presumption of liability arises from the fact of an explosion. No such question is here involved.

(**3**.) The carrier has brought the loss within the scope of the exceptions.

(*a*.) The provision of the bill of lading was that "the ship shall not be liable for loss or damage occasioned by the

perils of the sea or other waters * * * or other accidents of navigation, of whatsoever kind." The damage was of the *kind* excepted, and was caused by a peril to which it was subject in carriage by sea, as distinguished from carriage by land. It was an "accident of navigation," not only within the ordinary sense of those words, but also within the ruling of adjudged cases.

There is no antagonism between our cases and the English, as the appellant seems to intimate, either on the subject of insurance, or on the subject of exceptions in bills of lading. Formerly, there was a difference touching the expediency of permitting exemptions from negligence; but that difference, irrelevant to the case in hand, has been largely abolished by the Harter Act (2 Supp. R. S., c. 105, p. 81).

(*b.*) The finding of the lower courts that the damage was not contributed to by any fault on the part of the carrier deprived the appellant of its only ground of claim under the bill of lading. It was open for contention in the lower courts that although the loss was within the exception, the carrier was not entitled to the benefit of it, by reason of contributing negligence by its servants; but as no negligence by the carrier was found, and the loss was within the exception, exemption from responsibility necessarily follows.

(*c.*) The casualty occurred during the voyage.

Although the ship had arrived at her dock, the cargo which was damaged was still on board and in her custody, under the terms of the contract of carriage. The obligation undertaken by the vessel, in respect of it, continued until delivery; and during the continuance of the obligation the exceptions upon her liability were also in force (*Scott* v. *Baltimore Steamboat Co.*, 19 Fed., 56, cited with approval to this point in *Constable* v. *National S. S. Co.*, 154 U. S., 51, 63; The *Southgate* (1893), Prob., 329; The *Castleventry*, 69 Fed., 475, note).

Last Point.

The loss was within the language of the exception, and occurred without the ship's fault; the question certified should, therefore, be answered in the affirmative.

NEW YORK, December 11, 1897.

Respectfully submitted,

CONVERS & KIRLIN,
Proctors for Appellee.

J. PARKER KIRLIN,
Advocate.